This Recommended Liability Determination became the Order and Decision of the Illinois Human Rights Commission on 6/12/02.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
RICHARD PIERCE,	)	
	)	**CHARGE: 1998CF1131**
Complainant,	)	**EEOC: 21 B 980366**
	)	**ALS NO: 10806**
	)	
and	)	
CITY OF HARVEY,	)	
Respondent.		

Recommended Liability Determination

On April 30, 1999, the Illinois Department of Human Rights filed a complaint on behalf of Complainant, Richard Pierce. That complaint alleged that Respondent, City of Harvey (City), retaliated against Pierce by refusing to recall him to work, after being laid off, because of his participation in administrative proceedings regarding charges of discrimination against the City.

A public hearing was held on the allegations of the complaint on January 17, 2001. Subsequently, the parties filed post-hearing briefs. The matter is now ready for decision.

Findings of Fact

Those facts marked with asterisks are facts to which the parties stipulated. The remaining facts are those which were determined to have been proven at the public hearing in this matter. Assertions made at the public hearing, which are not addressed herein, were determined to be unproven or immaterial to this decision.

1. Complainant Pierce was hired as a meter reader for the City of Harvey Water Department on May 15, 1986.*

2. In August 1996, Complainant was union president of Local 2404.*

3. On or about July, 1996, Respondent laid off Complainant from his position as a meter reader for the City of Harvey.*

4. During his time with Respondent, Complainant performed his duties in a satisfactory manner.*

5. In October 1997 Lori Vassar was given a vacant meter reader position in the City of Harvey. Ms. Vassar was a current employee of Respondent but was not on layoff status.

6. Lori Vassar had seniority over Complainant Richard Pierce.

7. At all relevant times, the policy regarding layoff and recall rights were governed by the Collective Bargaining Agreement between the City of Harvey and Local 2404, Illinois Counsel 3, American Federation of State, County and Municipal Employees, AFL-CIO (CBA).

8. In August 1996, Complaint was a witness for Ms. Betty Harris regarding a charge of discrimination filed against the City of Harvey alleging that the Respondent discriminated against her because of her religious beliefs.*

9. In approximately November 1996 Complainant participated in a fact finding conference at the Illinois Department of Human Rights providing testimony against the City of Harvey and on behalf of employee John Silas.*

10. Nick Forte, Administrative Assistant to the Mayor, during an argument with Complainant while he was laid off, stated: “You are a bum, you will never work for the City of Harvey again”.

11. Mayor Graves makes the ultimate decisions regarding hiring and firing at the City of Harvey for full and part time positions.

12. Nick Forte was an Assistant to Mayor Graves’

13. Mayor Graves was aware that Complainant was seeking a job with the City of Harvey.

14. Complainant was qualified for the security, maintenance, driver, custodian and laborer positions with Respondent.

15. Between July 1996 and January 1999, during which time Complainant was on layoff, City of Harvey records show that that it employed more than 100 employees to perform full or part time work for the City.*

16. Additionally, while Complainant was on layoff, Respondent hired Sam Berry, Perry Johnson, and John Morrow as laborers, Grant McGowan for the position of load operator and driver, and Kenneth Perry and Clifford Rainey for operator positions.*

17. Part-time positions at the City of Harvey are not subject to the CBA.

18. Part time positions that are available with the City of Harvey are not posted; their availability is communicated by word of mouth.

19. Civil Service positions with the City of Harvey can only be awarded by the Civil Service Commission, after a candidate passes a written test.

20. Complainant has not taken the Civil Service Test.

21. A position as a driver became available in the City of Harvey Streets Department in February of 1997.*

22. Complainant signed a "bid sheet" indicating his interest in the driver position.

23. Complainant was on layoff when he signed the "bid sheet".

24. Robert Sams, instead of Complainant, filled that position. Prior to taking that position, Mr. Sams worked in the City of Harvey Streets Department.

25. Complainant was rehired by the City of Harvey on January 15, 1999 as a driver. His starting gross pay was $28,071.68. Complainant lost all his seniority with the City of Harvey due to the length of time he was laid off.*

26. Pursuant to the CBA, since Complainant was hired two years after being placed on layoff, he lost all his seniority and benefits.

27. Mayor Graves testified that when he rehired Complainant he, as Mayor, was able to give Complainant certain benefits to which he was not entitled pursuant to the CBA.

Conclusions of Law

1. Complainant is an "aggrieved party" as defined by section 1-103 (B) of the Illinois human Rights Act, 775 ILCS 5/101 et seq. (1999) (The Act).

2. Respondent is an "employer" as defined by section 2-101 (B) (1) (c) of the Act and is subject to provisions of the Act.

3. The evidence admitted during the public hearing on this matter, are sufficient to prove that Respondent unlawfully discriminated against Complainant.

Discussion

Liability

The method of proving a charge of discrimination is well established. Complainant must establish a prima facie showing of discrimination. If he does so, Respondent must articulate a legitimate, non-discriminatory reason for its actions. Then, in order for complainant to prevail, he must prove that respondent's articulated reason is pretextual. Zaderaka v. Human Rights Commission, 131 Ill.2d 172, 545 N.E.2d 684 (1989).

In order to establish a prima facie case of retaliation, Complainant must present facts establishing that (1) he engaged in a protected activity that was known by the alleged retaliator; (2) the respondent subsequently took an adverse action against complainant; (3) there was a causal connection between the protected activity and the adverse action. Jones and Commonwealth Edison Company, Ill.HRC Rep. (1987CF1778, 1988CF3261, September 11, 1995), Donald Witty and Illinois Department of Public Health, 1995 ILHUM LEXIS 575, (September 26, 1995).

In the case at bar, the protected activity in which Complainant engaged was

that in August 1996, he was a witness for Ms. Betty Harris regarding a charge of discrimination filed against the City of Harvey alleging that the City discriminated against her because of her religious beliefs. Also, in approximately November of 1996, Complainant participated in a fact finding conference at the Illinois Department of Human Rights, providing testimony against the City of Harvey and on behalf of John Silas, also a City of Harvey employee. These actions qualify as protected activity under the Illinois Human Rights Act. Watson and Chicago Park District, Charge no. 1994CF3563, EEOC No. 21B933661, ALS No. 8603 (July 8, 1998). Complainant clearly established the first prong of his prima facie case.

Pierce also established the second prong of his prima facie case -- he was not recalled from layoff for more than two years. Failure to recall qualifies as an adverse action. Ross and Safer Foundation, 1996 ILHUM LEXIS 22 (February 28, 1996). During that time, between July 1996 and January 1999, Respondent hired other individuals into positions for which Complainant was qualified, despite Complainant's experience and ten-year work history with the City of Harvey, and Respondent's knowledge that Complainant was seeking employment. Complainant had performed satisfactorily for Respondent in his previous position with the City. Pierce's cause of action is not negated due to the fact that Respondent recalled him more than two years after his initial layoff; because Complainant was on layoff for more than two years, pursuant to the CBA, he lost all seniority.

Thirdly, Complainant must show that there was a causal connection between the protected activity and the adverse action. Pierce attempts to establish this prong in three ways: (1) direct evidence; (2) by showing that similarly situated individuals were treated

more favorably; and (3) by showing a temporal connection. Pierce has established the third prong of his prima facie case. First, he provided direct evidence that the Mayor's Administrative Assistant, Dominic Forte, told Complainant that he would never work for the City of Harvey again. Also, Pierce showed that similarly situated individuals who did not participate in union activity were treated more favorably than he. Finally, Pierce established a temporal connection between his protected activity and the adverse action taken against him.

Pierce's direct evidence of a causal connection between his protected activity and Respondent's failure to recall him is the statement by Dominic Forte -- that he (Pierce) would never work for the City of Harvey again. (R. 86) Complainant argues that this statement provides the nexus necessary to prove the causal connection, since Forte was aware of Pierce's assisting Harris and Silas in their discrimination claims and was a close assistant to the Mayor. Complainant argues that it is incredible for Respondent to claim that Forte had no influence on the Mayor's failure to recall him for two years -- even to a part time job. While, standing alone, this would not be sufficient to establish a causal connection between Complainant's protected activity and the adverse action taken against him, it takes on greater weight when viewed in totality with other evidence presented, *infra*.

Next, Complaint presented evidence showing that between August 1996, when he first aided Harris in her discrimination claim, and January 1999, when he was recalled, 155 individuals were hired or rehired by Respondent who did not participate in union activities and had less seniority and less prior experience than he. [1] Complainant argues that these individuals are similarly situated to him but were treated more favorably;

[1] Positions filled after January 1999, the date Complainant was recalled, are irrelevant to this analysis.

Complainant's Exhibit 3 lists these individuals. *(Complainant's Closing Brief at 11-12).* Complainant testified that he was qualified for security, laborer, maintenance, custodian and driver positions (R. 42). Upon review of Complainant's Exhibit 3, 7 security positions, 4 laborer positions, 2 maintenance positions, and 3 custodian positions were filled during that time.

Complainant was not qualified for the remaining positions. 74 of the individuals were hired into civil service positions. These positions require that the individual pass a civil service test. There is no evidence that Complainant even took such a test. Consequently, the individuals that were hired into civil service positions are not similarly situated to Pierce.

20 of the positions were that of Deputy Marshal, 5 were Youth Program positions, 4 were positions in the Mayor's Office, 4 were clerk positions, 3 were Detention Officers, 1 was a Security Maintenance position and the remaining five were Production Producer, Alderman, Supervisor of Inspectional Services, Paid on Call and Deputy Controller positions. Again, Complainant testified that he was qualified for the following jobs: custodian, security, laborer and maintenance and driver. (R. 42). Clearly, Pierce was not qualified for positions other than those 5 above. Therefore the individuals who were hired into those positions are not similarly situated to Complainant.

Next, Complainant specifically names the following individuals, alleging that they were hired by the City of Harvey and had less seniority than he: Grant McGowan, Sam Berry, Perry Johnson, John Morrow, Kenneth Perry, and Clifford Rainey. Pierce argues that they are similarly situated to him, did not participate in protected activity as he did; yet they were treated more favorably. Complainant established that McGowan,

Johnson, and Morrow were similarly situated to him, did not participate in union activity and were treated more favorably than he.

Grant McGowan was originally hired to a full time position in 1991[2]. He was terminated on April 26, 1996 and rehired on October 14, 1996, while Complainant was on layoff. Respondent's articulated reason for hiring McGowan is that he had past experience with the City. *(Respondent's Closing Brief at 22).* However, Complainant was originally hired in 1986; he had more past experience with the City than McGowan. Based upon the evidence offered, Complainant was similarly situated to McGowan, but McGowan was treated more favorably. Complainant had been employed by the City for a longer period of time; Respondent's reason for hiring McGowan is a pretext for discrimination.

Sam Berry was originally hired as a part-time laborer with the Streets Department in 1994. He was terminated in March 1996 and rehired as a part-time laborer in August 1996, while Complainant was on layoff. Berry was rehired into the same position as he was terminated from in March 1996. Complainant had been a meter reader during his tenure with the City. As such, Respondent's articulated reason for rehiring Berry – that he had past experience with the City *(Respondent's Closing Brief at 22-23)* – is valid. Berry had past experience with the City as a laborer. As such, Berry had more experience in that position than Complainant. Respondent's reason for hiring Berry is not a pretext for discrimination.

Perry Johnson was originally hired as a part time laborer in the Streets Department on September 28, 1998, while Complainant was on layoff. Respondent hired Johnson to the laborer position, despite Complainant's past experience with the City.

[2] What position McGowan was hired to fill in 1991 is unclear.

Respondent states that Johnson was hired 18 months after Complainant's protected activity, therefore, because of that 18-month time span, there is no causal connection.

However, Complainant first participated in the protected activity in August of 1996. According to the evidence presented, the City was hiring for positions for which Complainant was qualified as early as August of 1996 and as late as October 1998. Complainant was not hired during that time despite the fact that the Mayor, who makes the decisions regarding hiring, knew that Complainant was looking for work. Respondent's violation of the Act was a continuing violation; it began in August of 1996. See, Reginal Ross and Safer Foundation, 1996 ILHUM LEXIS 22, at pg. 5 (February 28, 1996). Therefore there is a temporal connection between Complainant's protected activity and the hiring of Johnson in October 1998. Based upon the evidence offered, Complainant was similarly situated to Johnson, who did not participate in union activity, but Johnson was treated more favorably. Also, Johnson had less experience with the City. Respondent offers no legitimate reason for Johnson's hiring. Respondent discriminated against Complainant by hiring Johnson despite the 18-month time span between Johnson's hiring and Complainant's protected activity.

John Morrow was originally hired as a part time laborer on June 30, 1997, while Complainant was on layoff. Respondent hired Morrow to the laborer position, despite Complainant's past experience with the City. Respondent fails to articulate a legitimate reason why Morrow, who had less experience with the City than Complainant, was hired for the laborer position instead of Complainant; it fails to articulate a legitimate reason why its hiring of Morrow is not a pretext for discrimination. Pierce had past experience with the City and was qualified for the laborer job. Also, Respondent failed to offer any

evidence to show that its hiring of Morrow was not discriminatory against Complainant. Based upon the evidence offered, Complainant was similarly situated to Morrow, but Morrow was treated more favorably. Respondent discriminated against Complainant by hiring Morrow.

Kenneth Perry was originally hired in the Streets Department on May 5, 1979. Perry retired from the City on January 3, 1997 and was rehired as a part time operator on July 13, 1998. Complainant began working for Respondent in 1986. Respondent's articulated reason for hiring Perry – that he had more seniority – is valid.

Clifford Rainey was originally hired in the Streets Department on September 15, 1978. Rainey retired on January 3, 1997 and was rehired as a part time operator on July 1, 1998. Again, Complainant began working for Respondent in 1986. Respondent's articulated reason for hiring Rainey – that he had more seniority – is valid.

It should be noted that the part time positions with the City of Harvey are not posted. An individual becomes aware of them by word of mouth. Mayor Graves testified that individuals call him so that he can authorize prospective hires for these positions (R. 119-120). Also, Mayor Graves testified that he told Complainant that if something opened up, he (Graves) would consider him (R. 106). Clearly, Mayor Graves had the last word on who filled these positions. Yet, Mayor Graves did not hire Complainant for any of these positions despite Complainant's repeated requests for employment. It is clear to this tribunal that Respondent engaged in retaliation against Complainant; the individuals who were hired to fill the 7 security positions, 4 laborer positions, 2 maintenance positions, 3 custodian positions, and McGowan, Johnson and

Morrow are similarly situated to Complainant, did not participate in protected activity and were treated more favorably by Respondent.

Next, Complainant argues that a driver position was given to Robert Sams, over whom he had seniority. Complainant argues that Sams is yet another similarly situated individual who did not participate in the protected activity that Complainant had, and was treated more favorably.

When a union position is vacant, that vacancy is posted and interested individuals apply by signing a "bid sheet". Complainant signed a bid sheet for a unionized driver position in the City of Harvey Streets Department while he was on layoff. That position was awarded to Robert Sams, according to the rules set out in the CBA. Section E of the CBA states as follows:

> [When] the City decides to fill a vacant position, it shall first recall from layoff, in accordance with Section F[3], a laid off employee [who had held the same position in the same] department which the vacancy exists. If no such employee is on layoff…[t]he City shall fill the position in accordance with the standards set forth in Section D[4], the seniority shall be as follows:
>
> 1. Employees presently working in the department in which the vacancy exists;
> 2. Employees from other classifications on layoff in the department in which the vacancy exists;
> 3. Employees presently working in departments other than the one in which the vacancy exists; and
> 4. Employees on layoff in departments other than the one in which the vacancy exists.

(Group Exhibit 3). In the instant case, the driver position in the Streets Department was vacant. Therefore, the City, pursuant to the CBA, was obligated to recall an individual who was laid off from a driver position in the Streets Department. No such individual

[3] Section F, entitled Layoff and Recall, states: "Employees shall be recalled by seniority, in all instances described below, provided the employee has the then present ability to perform the required work without further training."

[4] Section D states in relevant part: "When the skill, ability, training and physical fitness required to perform a job are relatively equal, seniority shall govern in filling vacant positions . . .in layoffs and recalls. . .

existed, so the City was obligated to hire someone who fit description 1, above. Robert Sams was presently working in the Streets Department, so he fit description Number 1. Complainant would have fit the fourth ranking description, so the City was obligated to give the job to Sams.

Complainant cites the following language from the CBA to support his contention that he should have been awarded the driver position:

> "…An employee subject to layoff has priority in seniority order over bidders and outside applicants to fill jobs of equal or lower graded classifications, deemed vacant by the City, first in the employee's department and then in other departments, provided the employee has the then present ability to perform the required work without further training."

(Respondent's Group Exhibit 3). This language also appears in the section of the CBA entitled Layoff and Recall. However, it appears in the portion devoted to layoffs – not recalls --, as indicated when the section is read in its entirety. This case concerns Respondent's failure to recall Complainant, not a violation concerning his right to move to another vacant position when he was about to be laid off. Consequently, the above section does not apply. For the reasons set out above, Sams was not similarly situated to Complainant.

Next, we will address whether Complainant established a causal connection by temporally connecting the protected activity and the adverse act. Respondent argues that many of the hires and rehires cited by Complainant, occurred too long after Complainant's participation in Harris' and Silas' actions at the Commission, therefore Complainant cannot show that there was a temporal nexus between the protected activity and the adverse act. However, Complainant first participated in the protected activity in August of 1996. According to the evidence presented, the City was hiring for positions

for which Complainant was qualified as early as August of 1996, and through October 1998. But, Complainant was not hired during that time despite the fact that the Mayor, who was the decision maker regarding hiring, knew that Complainant was looking for employment; Complainant was quite persistent in trying to obtain employment at the City of Harvey (R.64, 106, 121-22, 126). Respondent's violation of the Act was a continual one. See, Ross, (1996 ILHUM LEXIS at 5 (February 28, 1996). The violations began in August 1996, when Respondent began to hire other, less qualified persons for jobs for which Complainant was qualified. This began to occur almost immediately after Complainant participated in Betty Harris' case against Respondent and continued for just over two years, until the end of 1998; Complainant was recalled in January 1999. Respondent recalled Complainant when recalling him would result in his losing his seniority. See, Ellis and Brunswick, 31 Ill.HRC Rep. 325 (1987), Reginal Ross and Safer Foundation, 1996 ILHUM LEXIS 22 (February 28, 1996).

In sum, Complainant has established his prima facie case. He demonstrated that he engaged in a protected activity – aiding Betty Harris and John Silas in their discrimination claims against the City of Harvey. He also demonstrated that an adverse action was taken against him – the City did not recall him for over two years, at which time he lost all of his seniority.

Also, Complainant demonstrated that there was a causal connection between the protected activity and the adverse action. Pierce demonstrated the causal connection through direct evidence—Nick Forte's statement indicating that Pierce would never work for the City of Harvey again. Pierce also demonstrated that there is a temporal link between his protected activity and the adverse action taken against him. Finally, the City

filled sixteen security, laborer, maintenance, or custodial positions while Complainant was on layoff. Grant McGowan and Perry Johnson, and John Morrow were hired by the City to fill part time laborer positions while Complainant was on layoff. The City filled all of the above positions with persons who had less seniority than Complainant. Pierce was qualified for all of these positions. Also, none of the individuals who filled these positions participated in protected activity; they are similarly situated to Complainant but were treated more favorably. Additionally, Complainant provided evidence that Respondent's allegedly legitimate, non-discriminatory reasons for its actions are pretexts for discrimination.

Damages

A prevailing Complainant is presumptively entitled to reinstatement to a job lost because of unlawful discrimination. In the case at bar, Complainant was recalled into a driver position with a $28,071.68 annual salary. Consequently, the reinstatement issue is moot; reinstatement is not recommended.

Complainant is also entitled to a back pay award. He was originally laid off in July of 1996; Respondent began recalling individuals into City positions as early as August 5, 1996. On that date, Respondent hired Alexander LeFrano into a Security position, for $7.00/ hour; Complainant was qualified for that position. There were 126 weeks between August 5, 1996 and January 15, 1999, the date Complainant was recalled. Back pay liability ends when Complainant begins to earn more money than he would have earned in the security position. See, Martin and Sangamon State University, 48 Ill. HRC Rep. 59 (1989), rev'd on other grounds *sub nom* Board of Regents for Regency

Universities v. Illinois Human Rights Commission, 196 Ill.App3d 187, 552 N.E.2d 1373 (4th District 1990). Based upon a 40-hour work week, Complainant's wages during that time would have been $35,280. There was no testimony regarding raises given in non-union positions, or whether Complainant would have moved into another, higher paying position before he was recalled in January 1999.

However, in 1997, Complainant was paid $10,534.87 while working at Ballentine's Power and Light, Inc., and $3289 while working at South Suburban College *(Exhibit 14)*. Also, in 1998, Complainant collected $2783 in Unemployment Insurance *(Group Exhibit 16)*. These amounts should be subtracted from the $35,280 figure. Consequently, it is recommended that Complainant receive an $18,673.13 back pay award.

Next, Complainant requests that all of his benefits under the CBA that he lost because he was not recalled into a union position be restored. However, the only evidence of a vacant union position, while he was on layoff, for which Complainant was qualified, was the driver position that was awarded to Robert Sams. For reasons outlined *supra* , Complainant was not entitled to be recalled into that position. All other positions for which the City hired were non-union *(See, Exhibit 3)*. Since there is no evidence that a union position for which Complainant was qualified was vacant during the time that he was laid off, it cannot be said that Pierce would have been able to retain his benefits and seniority but for Respondent's violation of the Act. Therefore, reinstatement of Complainant's seniority and benefits is not recommended.

Complainant also seeks an award for emotional harm and mental suffering that he suffered as a result of Respondent's actions. That request is denied. The Human Rights

Commission presumes that recovery of pecuniary losses will fully compensate Complainant. Emotional distress damages should only be awarded when the facts clearly and unmistakably show that recovery of pecuniary loss will not fully compensate Complainant. Smith and Cook County Sheriff's Office, 19 Ill.HRC Rep. 131 (1985). In the case at bar, there has not been a clear and unmistakable showing that Pierce will not be fully compensated by reimbursement of his pecuniary losses. As a result, it is not recommended that Complainant receive any award for emotional harm and mental suffering.

Because of the substantial delay in his receipt of the above recommended damage awards, prejudgment interest is necessary to make Complainant whole. Such interest is recommended on the back pay award.

Additionally, it is recommended that Respondent be ordered to clear all references to this case or to the underlying charge of discrimination from Complainant's personnel records.

Finally, Complainant is entitled to an award of his attorney's fees. That issue will be addressed after receipt of an appropriate motion to be filed within 21 days of the service of this recommendation. Respondent will be allowed to file a written response to that motion.

Recommendation

Based upon the foregoing, Complainant proved that Respondent retaliated against him for his participation in discrimination cases against Respondent that were filed by

other individuals. Accordingly, it is recommended that the complaint in this matter be sustained and that Complainant be awarded the following relief:

A. That Respondent pay to Complainant the sum of $18,673.13 for lost back pay;

B. That Respondent pay to Complainant prejudgment interest on the back pay award, such interest to be calculated as set forth in 56 Ill. Adm. Code, Section 5300.1145;

C. That Respondent clear from Complainant's personnel records all references to the filing of the underlying charge of discrimination and the subsequent disposition thereof;

D. That Respondent pay to Complainant the reasonable attorney's fees and costs incurred in the prosecution of this matter, that amount to be determined after review of a motion and detailed affidavit meeting the standards set forth in Clark and Champaign National Bank, 3 Ill. HRC Rep. 193 (1982), said motion and affidavit to be filed within 21 days after the service of the Recommended Liability Determination; failure to submit such a motion will be seen as a waiver of attorney's fees;

E. If Respondent contests the amount of attorney's fees, it must file a written response to Complainant's motion within 21 days of the service of said motion; failure to do so will be taken as evidence that Respondent does not contest the amount of such fees;

F. The recommended relief in paragraphs A through C is stayed pending resolution of the issue of attorney's fees and issuance of a final Commission order.

HUMAN RIGHTS COMMISSION

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BY:
WILLIAM H. HALL
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: August 20, 2001